IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL DIVISION

FLORIDA EQUITY TRUST, LLC,
A Florida limited liability company,

Plaintiff,

vs. CASE NO.: 19-CA-1335

THE VILLAGE OF ESTERO,
a Florida municipal corporation.

Defendant.
_____/

MOTION TO DISMISS

COMES NOW the Defendant, THE VILLAGE OF ESTERO (hereinafter the "Village"), by and through its undersigned counsel, and hereby files this Motion to Dismiss, pursuant to Fla. R.Civ.P. 1.140(b), for failure to state a cause of action. Further, Plaintiff's action, even if found to be legally sufficient, is premature and not ripe for adjudication. In support of the motion, the Village would state as follows:

FACTUAL BACKGROUND

1. Plaintiff is the owner of real property in Estero, Florida and located within Lee County, FL (hereinafter "Subject Property").[1]

2. Plaintiff took title to the Subject Property in September of 2015 via Tax Deed.[2]

3. Beginning in late 2018, Plaintiff initiated discussions with Village staff and legal counsel regarding development of residential homes upon the Subject Property.[3]

4. The correspondence between Plaintiff and agents for the Village is attached as "Exhibit 2" to the Complaint and speaks for itself.

5. On March 8th, 2019, Plaintiff filed a two-count Complaint alleging causes of action for inverse condemnation and declaratory relief.

[1] See Ex. 1 to Complaint

[2] See Ex. 1 to Complaint

[3] See Ex. 2 to Complaint

6. Considering the totality of the circumstances, Plaintiff most likely purchased the Subject Property in haste at the Tax Deed Sale (and most likely below just value) without performing due diligence; and now, Plaintiff attempts to coerce the Village into purchasing the Subject Property for consideration above Plaintiff's purchase price.

7. Also plausible, Plaintiff may have purchased the Subject Property at a Tax Deed Sale with the intention of flipping the Subject Property; whereas, prior to filing litigation, Plaintiff "offered" the Subject Property for sale to the Villages at a price of $115,000.000 – a substantial premium over the consideration paid at the Tax Deed Sale – in lieu of litigation.[4]

8. As will be shown *infra*, Plaintiff fails to state a cause of action for inverse condemnation and declaratory relief, and the complaint must be dismissed in its entirety.

STANDARD OF REVIEW AND APPLICABLE LAW

9. The primary purpose of a motion to dismiss is to request the trial court to determine whether the Complaint properly states a cause of action for which relief can be granted and, if it does not, to enter an order of dismissal. *Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022 (Fla. 4th DCA 1996). When considering a motion to dismiss, the court's gaze is restricted to only what is contained within the confines of the pleadings, including any exhibits incorporated therein by reference, and all matters outside of the pleadings may not be considered. See *Crocker v. Marks*, 856 So.2d 1123 (Fla. 4th DCA 2003); *Conseguera v. Lloyds Underwriters of London*, 801 So.2d 111 (Fla. 2d DCA 2001).

10. "Inverse condemnation is a cause of action by a property owner to recover the value of property that has been de facto taken by an agency having the power of eminent domain where no formal exercise of that power has been undertaken." *Sarasota Welfare Home, Inc. v. City of Sarasota*, 666 So.2d 171 (Fla 2d DCA, 1995); *City of Pompano Beach v. Yardarm Restaurant, Inc.,* 641 So.2d 1377 (Fla. 4th DCA 1994).

11. To state a claim for inverse condemnation, a landowner must demonstrate either: (1) a continuing physical invasion of the property, *see Village of Tequesta v. Jupiter Inlet Corp.,* 371 So.2d 663 (Fla. 1979) or (2) a substantial ouster and deprivation of all beneficial use of the property, *see Division of Admin., State Dept. of Transp. v. West Palm Beach Garden Club,* 352 So.2d 1177 (Fla. 4th DCA 1977).

[4] See "Exhibit 2" to Complaint, email from Plaintiff to Defendant dated Jan. 17th, 2019

12. To reiterate, "a 'taking' occurs when an owner is denied substantially all economically beneficial or productive use of the owner's land." *Sarasota Welfar* at 173; *Tampa–Hillsborough County Expressway Auth. v. A.G.W.S. Corp.,* 640 So.2d 54 (Fla.1994).

13. "A facial taking, also known as a per se or categorical taking, occurs when the mere enactment of a regulation precludes all development of the property, and deprives the property owner of all reasonable economic use of the property." *Collins v. Monroe County*, 999 S0.2d 709, 713 (Fla. 3d DCA 2008); *see also Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1017, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (holding that the deprivation of economic value required for a facial takings claim is limited to the extraordinary circumstance when *no* productive or economically beneficial use of the land is permitted).

14. "Anything less than a complete elimination of economically beneficial use or value of the land is not a facial taking." *Id.; Lucas,* 505 U.S. at 1019–20 n. 8, 112 S.Ct. 2886; *Taylor v. Village of North Palm Beach,* 659 So.2d 1167, 1170–71 (Fla. 4th DCA 1995) (holding that the standard of proof for a facial taking is whether the regulation at issue has resulted in deprivation of all economic use).

15. Before a court may consider a claim for inverse condemnation, the claim must be ripe for adjudication.

16. "To be ripe for judicial review the Landowners must show a final determination from the government as to the permissible use, if any, of the property. If there has not been a final determination, the Landowners' attempt to seek redress from the court is premature." *Id.* at 715; *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186–94, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

17. In general, for a takings claim to become ripe for adjudication, a property owner must follow "reasonable and necessary" steps to permit the local government or regulatory agency to exercise its discretion in considering development plans, "including the opportunity to grant any variances or waivers allowed by law." *Palazzolo v. Rhode Island,* 533 U.S. 606, 620–21, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).

18. "The requirement is usually met when the property owner files an application for a development permit with the local land use authority and receives a grant or denial of the permit." *Collins* at 716; *see also, Glisson v. Alachua County,* 558 So.2d 1030, 1034 (Fla. 1st DCA 1990)(holding that property owner failed to apply for, and been denied, a development permit, variance or rezoning request, resulting in a facial challenge).

19. "Once it becomes clear that the government authority 'lacks the discretion to permit any development, or [that] the permissible uses of the property are known to a reasonable degree of certainty,' it is only then that a takings claim is likely ripe." *Id.*citing *Palazzolo,* 533 U.S. at 620, 121 S.Ct. 2448.

20. Under the above standard of review and the well-settled case law, Plaintiff fails to state a cause of action and Plaintiff's claim, if legally sufficient, is premature. Therefore, the complaint must be dismissed.

ARGUMENTS FOR DISMISSAL

Count I – Inverse Condemnation

21. **First**, Plaintiff fails to state a cause of action for inverse condemnation.

22. To state a claim for inverse condemnation, a landowner must demonstrate either: (1) a continuing physical invasion of the property, *see Village of Tequesta v. Jupiter Inlet Corp.,* 371 So.2d 663 (Fla. 1979) or (2) a substantial ouster and deprivation of all beneficial use of the property, *see Division of Admin., State Dept. of Transp. v. West Palm Beach Garden Club,* 352 So.2d 1177 (Fla. 4th DCA 1977).

23. As set forth in *Sarasota Welfare Home, Inc. v. City of Sarasota*, a "taking occurs when an owner is denied *substantially all economically beneficial or productive use* of the owner's land." (emphasis added)

24. Plaintiff's complaint fails to allege either a "physical invasion" onto the Subject Property or that "substantially all economically beneficial or productive use" of the Subject Property has been denied. The complaint merely references Plaintiff's alleged inability to construct residential homes on the Subject Property.

25. "Anything less than a complete elimination of economically beneficial use or value of the land is not a facial taking." *Collins v. Monroe County*, 999 S0.2d 709, 713 (Fla. 3d DCA 2008).

26. Plaintiff's only claim of a "taking" is that the Subject Property "is now restricted by the Defendant, Plaintiff's property has been taken for a public purpose."[5]

27. A claim that the Subject Property is merely "restricted" does not meet the pleading requirements for inverse condemnation and falls woefully short of showing a "complete elimination of economically beneficial use or value" of the Subject Property.

28. Similarly, Plaintiff states no facts in support of the bald accusation that the Subject Property was "taken for a public purpose." Plaintiff cites no continuing invasion or encroachment onto the Subject Property by the Village. Plaintiff also cites no eminent domain proceedings or plans for "public use" for the Subject Property by the Village.

29. Because Count I lacks the necessary elements to state a cause of action for inverse condemnation, Count I must be dismissed.

30. **Secondly**, even if sufficiently pled, Plaintiff's inverse condemnation claim is not ripe.

31. Plainly stated, Plaintiff made no attempts to even begin developing the Subject Property. In fact, Plaintiff never even submitted a building permit application or development order application.

32. Plaintiff's entire claim rests upon emails and phone calls with Village staff and legal counsel, whereby Plaintiff disagrees with the Villages interpretation of the pertinent Land Development Code and Florida Building Code. *See "Exhibit 2" to the Complaint.*

33. Plaintiff then attempts to pass off these phone calls and emails as the requisite "final determination" and denial by the Village of *any attempt* to develop the Subject Property.

34. In reality, Plaintiff never submitted application for a building or development permit, never submitted development plans, never submitted architectural or site plans, and never

[5] Complaint, paragraph 9

requested any special exemption or variances to any Land Development Code or Florida Building Code regulations.

35. In short, Plaintiff never allowed the Village an opportunity to make a "final determination as to the permissible use" of the Subject Property. *See Collins v. Monroe County, 999 S0.2d 709, 713 (Fla. 3d DCA 2008).*

36. In contrast, Plaintiff took the correspondence attached to the complaint and ran to the courthouse to file litigation, despite the Village counsel's multiple and repeated written offers to meet with Plaintiff to "see what additional options may be available" for development.[6]

37. By the well-settled and accepted case law cited above, Plaintiff's claim is entirely premature, legally insufficient, and not ripe for adjudication.

38. For all those reasons, the Count I fails to state a cause of action for inverse condemnation, and Count I is not ripe for adjudication.

39. Accordingly, Count I must be dismissed.

Count II – Declaratory Relief

40. Count II fails to state a cause of action for declaratory relief and must be dismissed.

41. The standard for review of a complaint requesting declaratory judgment is set forth in *May v. Holley*, 59 So.2d 636, 639 (Fla. 1952):

> Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation

[6] Exhibit 2 to Complaint, email from Derek P. Rooney, dated Jan. 30th, 2019 and Feb. 20th, 2019

and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

42. In the instant matter, Plaintiff fails to plead that "there is a there is a bona fide, actual, present practical need for the declaration" and that the declaration deals with a "present, ascertained or ascertainable state of facts or present controversy as to a state of facts."

43. As described in Count I above, the Plaintiff's claim for inverse condemnation is premature, and Plaintiff's claim for declaratory relief is simply a restatement of the inverse condemnation claim.

44. The complaint fails to outline and plead an "actual, present, and practical need for declaration." Notably, Plaintiff has not applied for a building permit or development order, and the Village has neither denied any such applications or made a final determination as to the Plaintiff's use of the Subject Property.

45. To request declaratory relief at this juncture would amount to a mere advisory opinion from the Court to satisfy Plaintiff's curiosity and hypothetical scenario.

46. Until Plaintiff takes concrete steps to develop the Subject Property(i.e. apply for a building or development permit) and the Village makes a final determination as to Plaintiff's applications, all scenarios contemplated under Plaintiff's claim for declaratory relief are merely hypothetical.

47. Further, there are no "present, ascertained or ascertainable state of facts or present controversy as to a state of facts" for which the Court can make a declaration. For the aforementioned reasons, all facts put forth by Plaintiff are merely hypothetical, as a building permit or development order has neither been requested by Plaintiff nor denied by the Village.

48. Accordingly, Plaintiff fails to sufficiently plead the elements required for declaratory relief, and Count II must also be dismissed.

CONCLUSION

49. On its face, Plaintiff's complaint is legally insufficient and fails to state a cause of action for inverse condemnation and declaratory relief.

50. Even if found to be sufficiently pled, Plaintiff's claims for inverse condemnation and declaratory relief are premature and not ripe for adjudication.

51. More to the heart of this matter, the Village has in no way eliminated Plaintiff's economically beneficial use of the Subject Property. A clear and measured reading of the aforementioned correspondence shows that the Village acknowledges the Subject Property is appropriate for residential home development.[7]

52. What Plaintiff fails to comprehend is that no permit for development can be issued unless or until "access or other essential services are met" prior to beginning development; i.e. provisions for utilities, electric, sewage, as well as roadway access for emergency vehicles, mail delivery, and waste management services to the Subject Property.

53. As stated in the email to Plaintiff sent by Village counsel, Derek P. Rooney, and dated January 15th, 2019 (also included in Exhibit 2 to the Complaint), "*To be clear, construction of a new residential home is permitted as of right on any conforming lot of record, however all other applicable provisions of the land development code and Florida Building Code must also be met including those provisions relating to sufficient access or other essential services are met.*"

54. Accordingly, the Village has never curtailed the Plaintiff's economically beneficial use of the Subject Property. The Village has merely rendered an opinion on the building standards and services enumerated within the Land Development Code and Florida Building Code which must be met prior to development of the Subject Property.

55. Rather than exhausting all administrative remedies or taking all necessary and reasonable steps to resolve the disagreements with the Village, Plaintiff has chosen to file this vindictive litigation – even without a factual or legal basis to support the claims.

56. Considering the totality of the circumstances, Plaintiff most likely purchased the Subject Property in haste at the 2015 Tax Deed Sale (and most likely below just value) without performing due diligence; and now, Plaintiff attempts to coerce the Village into purchasing the Subject Property for consideration well-above Plaintiff's purchase price.

7 "Exhibit 2" to complaint, email from Derek P. Rooney dated Jan. 15th, 2019

57. Also plausible, Plaintiff may have purchased the Subject Property at the Tax Deed Sale with the intention of flipping the Subject Property for a hefty profit; whereas, prior to filing the instant litigation, Plaintiff "offered" the Subject Property for sale to the Villages at a price of $115,000.000 in lieu of litigation[8] – such a generous offer constituting a more than a 60% premium over the consideration paid at the Tax Deed Sale.[9]

58. Regardless of Plaintiff's motivations, the allegations within the complaint fall drastically short of stating a valid cause of action against the Villages.

59. For all those reasons stated above, Plaintiff's complaint must be dismissed in its entirety.

REQUEST FOR ATTORNEY FEES

Defendants has retained the undersigned attorney to represent them in this litigation and are obligated to pay a reasonable fee for these services. Defendant is entitled to reimbursement of these attorney fees and costs from the Plaintiff.

WHEREFORE the Defendant, VILLAGE OF ESTERO, respectfully requests this Honorable Court enter an Order granting the Motion to Dismiss, and award Defendant their reasonable attorneys' fees and costs, and any other relief this Court deems necessary and just.

/s/ Matthew B. Roepstorff
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[8] See "Exhibit 2" to Complaint, email from Plaintiff to Defendant dated Jan. 17th, 2019

[9] According to the Tax Deeds attached to the Complaint, Plaintiff paid an aggregate consideration of $45,337 for the Subject Property

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via electronic mail this 26th day of June, 2019 to:

William M. Powell, Esq.
Powell, Jackman, Stevens & Ricciardi, P.A.
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/s/ Matthew B. Roepstorff

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